

**Dillon Tile Supply Co., Inc. and Teamsters Union
Local 860, International Brotherhood of Team-
sters, Chauffeurs, Warehousemen & Helpers of
America, Case 20-CA-15113**

September 9, 1981

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND
ZIMMERMAN

On May 5, 1981, Administrative Law Judge Harold A. Kennedy issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief, cross-exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,¹ and conclusions of the Administrative Law Judge and to adopt his recommended Order.²

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

¹ The General Counsel has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enf'd, 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

² In affirming the Administrative Law Judge's finding that Respondent had no knowledge of the alleged discriminatees' union activities prior to the decision to discharge them, we find no need to rely on *A to Z Portion Meats v. N.L.R.B.*, 643 F.2d 390 (6th Cir. 1981).

DECISION

HAROLD A. KENNEDY, Administrative Law Judge: Respondent Dillon Tile Supply Co., Inc. (Dillon Tile), is charged in a complaint issued by the Regional Director of the National Labor Relations Board for Region 20, on March 31, 1980, with violating Section 8(a)(1) and (3) of the National Labor Relations Act, as amended (Act), by discharging two employees, Joseph Cloren and Darryl Chan,¹ on or about January 30, 1980, because they "joined, supported, or assisted the Union, and engaged in concerted activities for the purpose of collective bargain-

¹ Chan's first name is incorrectly spelled in the complaint.

ing or other mutual aid or protection, and in order to discourage employees from engaging in such activities or other concerted activities for the purpose of collective bargaining or other mutual aid or protection." The complaint also avers that the discharges preclude the holding of a fair election and that Respondent's refusal to recognize and bargain with the Teamsters Union Local 860, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Union), involved a violation of Section 8(a)(1) and (5) of the Act. The case was heard in San Francisco, California, on August 21 and 22 and October 14, 1980.²

After having carefully considered the briefs, the entire record, and applicable law, I have concluded that the General Counsel has failed to establish any violation of the Act. Accordingly, the complaint is being dismissed. Many of the issues are undisputed.

The Union, which filed the charge instituting this proceeding on February 31, is admittedly a labor organization within the meaning of Section 2(5) of the Act.

Respondent is admittedly an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The pleadings establish that Dillon Tile is a California corporation engaged in the sale and distribution of ceramic tile at wholesale. During 1979 Respondent admittedly purchased and received from outside of California goods and materials valued in excess of \$50,000. The record indicates Respondent maintains a place of business in San Francisco and another facility in nearby Mountain View, California.

Respondent admits discharging Cloren and Chan but denies violating the Act. It asserts Cloren was a supervisory employee as the term is used in Section 2(11) of the Act and, therefore, not protected by the Act.³

Respondent admits Larry Dillon (Larry) is an agent and supervisor of Respondent as those terms are used in the Act. The record also establishes that Robert Dillon (Robert), brother of Larry Dillon, Verna Dillon (Mrs. Dillon), mother of Larry and Robert Dillon, and John Wagner are supervisors and agents of Dillon. Thomas Dillon, husband of Verna and father of Larry and Robert, established the business of Dillon around 1936 but is now retired for all practical purposes. Mrs. Dillon is secretary-treasurer of Respondent and has been involved in operation of the company for 25 years.⁴ Robert is a vice president of Dillon and is in charge of

² All dates used herein refer to 1980 unless otherwise stated.

³ The parties disagree who should be in the appropriate unit. The complaint defines the appropriate unit as including:

All warehousemen and truck drivers employed by Respondent at its San Francisco, California, facility, excluding office clerical employees, guards and supervisors as defined in the Act.

The General Counsel's attorney maintains that sales clerks did not belong in the bargaining unit and that it only included four persons: Cloren, Chan, Hunter Romaine, and Leonard Matlovich. Respondent contends that Cloren should be excluded as a supervisory employee and that sales clerks should be included. I need not make a determination as to the appropriate unit as the General Counsel did not establish any unlawful discharge. The failure-to-bargain charge is predicated in part on proof of unlawful discharges.

⁴ Mrs. Dillon testified, "I do payroll, accounts payable, ordering all supplies—you name it."

Dillon's operation in Mountain View.⁵ John Wagner, who has an ownership interest through his wife, the daughter of Thomas and Verna Dillon, is vice president in charge of sales. His office is in the warehouse area of the San Francisco facility and is responsible for the warehouse operation there. He spends as much as 40 percent of his time away from the San Francisco office contracting tile contractors, general contractors, and architects in an effort to have Respondent's ceramic tile be used on major jobs.⁶

There are two selling areas at Respondent's San Francisco facility. There is a desk in the front where "walk-in trade" or retail customers are served. The other area is in the back of the warehouse where Wagner's office is located and contractors are served. Larry and Verna Dillon work in the front part of Respondent's San Francisco place of business.

The record shows that the Union by letter dated January 28 requested recognition as the exclusive representative of all of Respondent's employees working in production, warehousing, and truckdriving. The Union's letter offered to prove majority status through signed authorization cards and requested the company negotiate with it. Respondent's attorney responded by letter dated February 1, expressing good-faith doubt as to whether the Union represented an uncoerced majority in any appropriate unit and suggesting that the Union "set in motion the election processes" of the Act should the Union wish to pursue the matter further.

The record shows that four of Respondent's employees, Joseph Cloren, Darryl Chan, Hunter Romaine, and Leonard Matlovich, all of whom testified at the hearing, signed union authorization cards on January 23.

Hunter Romaine testified he was employed by Respondent in October or November 1979 after being interviewed by Larry Dillon. Romaine worked initially as a truckdriver and warehouseman at the San Francisco facility. After Cloren was discharged in late January 1980, Romaine spent part of his time in the back of the warehouse acting as an assistant salesman handling sales for contractors. In performing the sales work he said he would write out invoices, "pull orders" and sometimes place orders.

Romaine said he was assigned work as a warehouseman by Cloren and, after Cloren left, by Matlovich. Asked who had assigned work to him, Romaine said: "Joe [Cloren] and then Leonard, in that order or John Wagner or Darryl sometimes—everybody." He added, however, that Cloren and Wagner were the ones who assigned work to him "primarily." He said Cloren would tell him when he "messed up." The "complaints and problems" in the warehouse, he thought, never seemed to get resolved but through no fault of Cloren. Wagner, he said, gave him "plenty" of instructions.

⁵ The Mountain View operation is not involved in the proceeding. Robert said he had worked for Dillon off and on for 3-1/2 years. He said he was "essentially" the warehouse manager of Dillon and had "run our Mountain View operations" since "about 1977."

⁶ Wagner testified that he is responsible for "outside sales of the corporation and the administering of the warehouse, purchasing of the large orders, and . . . many other day-to-day duties."

Romaine said if he desired time off he would ask Wagner, Larry, or Cloren. After Matlovich succeeded Cloren as warehouse manager, he would ask Matlovich.

According to Romaine, Matlovich was the first person at Dillon Tile to talk about organizing employees. Romaine recalled going to the office of Local 860 and signing an authorization card for the Union. He recalled that the Union had been mentioned on occasions at the warehouse before January 30 but not in the presence of "Larry Dillon, John Wagner, Robert Dillon, or Mrs. Dillon."

Leonard Matlovich testified he was hired by Larry Dillon in October 1979 and worked under Cloren until the latter was discharged in late January 1980. Matlovich said Cloren assigned him work—"sweep the warehouse, fill orders, make customers happy"—and that he went to Cloren about problems or complaints. He recalled that Cloren had approved his time off when he went to see the doctor. Matlovich also recalled that Cloren criticized him for "slowing down" in his work and urged him to work harder. According to Matlovich, much of the time no one was in the warehouse above Cloren's level. Wagner would also tell Matlovich to do things, and Mrs. Dillon would do so on occasion.

Matlovich recalled three or so arguments between Wagner and Cloren. He remembered one in particular which occurred in front of customers about a month before Cloren was discharged. Shortly thereafter Wagner told Matlovich that "Joe just isn't making it here and he has to go." Matlovich indicated Cloren was disrespectful to Wagner. Said Matlovich: ". . . You know you just don't talk back to an employer that way."

Matlovich said he learned from Larry Dillon that Cloren was going to be fired the evening before it occurred. Matlovich worked late that day and recalled that Wagner introduced Bob Kaspar as possibly the new warehouse manager and Matlovich's boss. He recalled that Larry, as well as Wagner, met with Kaspar that evening.

Matlovich testified he became warehouse manager around March. He said he asked Wagner for the job and that it was given to him after Larry had been consulted. When given the job he said he was told he was part of management. As warehouse manager, Matlovich said he took on additional responsibilities—"maintaining the warehouse, doing all the back ordering, keeping stock, keeping the warehouse flow, maintaing [sic] it clean, general maintenance and supervision of the warehouse." He was given a raise (the second one given him at Dillon), he said, in May after he pointed out to Larry that others had been hired to work under him in the warehouse for wages close to what he was receiving. He said he supervised about four workers in the warehouse, and that Cloren supervised three persons.

Matlovich said there was talk about the union in the warehouse among employees, but they were careful not to let management hear them. "To the best of my knowledge," Matlovich said, the Dillons and Wagner "knew absolutely nothing of it." He signed a union authorization card at work but did so "secretly." Talk of the Union began, he said, about the same time Cloren and

Chan mentioned that they thought the Company was shortchanging employees for overtime work.

Darryl Chan started work for Dillon Tile at \$4 an hour on October 2, 1978, and was discharged on January 30, 1981 (G.C. Exh. 10).⁷ Chan was given a \$.25 hourly increase around June 1, and a \$1 hourly raise in October 1979. He was given another raise of \$.75 per hour in January, about 3 weeks before he was terminated.

Chan was hired by Larry Dillon and worked in the warehouse "in the back." Chan said he filled orders for tile contractors and also for the retail trade on those occasions when Billy Egan or Alan Fried, who worked in front, would call over the intercom for assistance. Chan said he was given training at first by a foreman named Wally Elms who had since "disappeared." Chan stated that when he first came to work, before Matlovich and Hunter were employed (whom he trained), he unloaded materials with a forklift, checked them and put them in stock. Later on, in addition to doing his regular warehouse work, he said he would order materials for Cloren.

Chan testified that he worked for about 3 weeks at Dillon before Cloren was hired as warehouse manager. Chan said, "Joe, John and Larry would . . . usually tell me what to do." He said Cloren was hired as the warehouse manager and that he was told to take orders from Cloren.⁸ Chan indicated Mrs. Dillon would rarely give him instructions, although she would tell him to sweep up the floor "or something like that" when she came to the back of the warehouse. Wagner, on the other hand, often complained of how things were organized and would interrupt Chan's regular warehouse work assigned by Cloren, Chan asserted. Chan said he spoke to Larry Dillon about the "disagreements" with Wagner two or three times but Larry would respond that Chan should "try to flow with it."

Larry Dillon hired Chan, gave him raises and time off. Chan said he received no warnings about his work and that Larry had complimented him on his performance. He identified a "letter of praise" written to "Darrell and Joe" by a Dillon customer under date of October 21, 1979 (G.C. Exh. 14). Mrs. Dillon had given it to him, he said.

Chan testified that he, Romaine, and Cloren went to the office of Union Local 860 in January and spoke to Bob Patterson about what the Union had to offer. Later, on the same day, he, Cloren, and Matlovich went to the Union's office, according to Chan, and turned in signed authorization cards. Chan indicated that he and other Dillon employees tried to keep their union activities confidential and that he was never questioned about the Union by Wagner or any of the Dillons.

Chan said he was discharged by Larry on January 30 shortly after Cloren reported that he (Cloren) had been fired. Chan said Larry called him into the office and spoke as follows:

Well, first he told me that he had to fire Joe for the better run of the business. He said that it was a hard thing for him to do, but that's why he had to fire me too, because for the better run of the business.

Chan said Larry sat at his desk and looked down at a folder while talking to him. Larry told Chan that Chan did not know how to do receiving or shipping work and that contractors were not being served properly. Larry also accused him and Cloren of "hiding in corners, laughing, and hiding from our work."

Joseph Cloren testified that he was hired by Larry Dillon to be the warehouse manager in October 1978. He was told that it was a "managerial-type position." Cloren stated that he had had about 2 years of prior warehousing experience. Cloren was paid by the hour, starting at \$8. He was raised \$.99 in May 1979 and another \$.50 on December 15 (G.C. Exh. 11). He was given a \$1 bonus when his first child was born.

Cloren testified that he spent 45 to 50 percent of his time doing actual physical work. He said he kept an inventory of materials, did some "shipping and receiving," sold materials over the counter to contractors and filled orders. Cloren said he ordered materials within guidelines given by Larry Dillon and Wagner. Approximately 20 to 25 percent of his time was spent on the telephone, "10 percent maybe" on the telephone at his desk in the office where Wagner also worked.

Cloren stated that sometimes there was only Chan working with him in the warehouse. He said he worked 7:30 a.m. to 4:30 p.m. and that others in the warehouse worked 8 a.m. to 5 p.m. Cloren said he had no authority to fire or hire and never interviewed a prospect. He said he did talk to Larry about the need for more help in the warehouse and that a man was hired shortly thereafter. Cloren stated that he did not authorize overtime, grant time off to employees or give any raises. The only "discipline" he said he administered was to take Matlovich aside one day and "say that I didn't think that he was pulling his weight." Cloren conceded on cross-examination, however, that as warehouse manager he was responsible for the training of warehousemen and that he directed their work, although he maintained they usually knew what to do. Cloren also acknowledged that Larry and Wagner would be away from the San Francisco facility at the same time, but he asserted that this would usually be only for an hour or so.

There were occasions when there was no time to sweep up in the warehouse, Cloren said. Thomas Dillon, Larry's father, had complained to Cloren about the appearance of the warehouse. Cloren said that Larry told him in December 1979, when Larry and Mrs. Dillon met with Cloren and agreed to his second raise, that he "should stick closer to the phone." The only other complaint Larry ever mentioned, other than those voiced at the time of his discharge,⁹ according to Cloren, related

⁷ Chan left Dillon's employment in December 1978 but returned on January 23, 1979.

⁸ Chan conceded that Cloren "was above" him and that Chan "had to check with him on things that [he] had to do . . ." Chan denied that he was told Cloren was his boss.

⁹ Cloren testified on cross-examination that Larry stated at the termination interview that contractors had complained about the way trucks had been loaded and the time required to get served. Cloren also acknowledged on cross-examination that Mrs. Dillon also had referred to the dirty floor and asked that phone calls be answered more promptly ("on the second ring").

to the way Cloren dealt with employees under him. According to Cloren, Larry told Cloren that he "wasn't working the guys hard enough" and that he was "too buddy-buddy" with subordinates. This complaint was voiced by Larry, Cloren said, in similar language on about three different occasions.

Cloren testified that Larry had complimented him on the way the warehouse looked on a few occasions. Cloren said he had received "complimentary bottles" or gifts from contractors who dealt with Dillon Tile. He said he was also taken to lunch by Dillon Tile customers.

Cloren recalled a couple of "disagreements" he had with Wagner. One occurred after Wagner declined to take the phone when Cloren requested Wagner talk to a customer about an appointment. The other occurred in January 1980, about 10 days before Cloren was terminated. Cloren said on that occasion he was helping a customer and Wagner "started yelling that I should help the guy who was on the telephone. . . ." Cloren continued:

. . . I said, "Wait a minute, John. Let me tell you what's going on here." He said, "I don't care what's going on. Go help that guy." I said, "Don't you want to hear my side of the story?" He said, "No, there's only one side to the story." I said, "No, John, there's always two sides to a story," and he said, "There's one side to a story." I said, "I don't care what you say, there's two sides to every story."¹⁰

Cloren stated that the exchange was not a yelling match but identified it as a conversation that Matlovich and others may have overheard.

Wagner belittled Chan and treated him "like he was a moron," according to Cloren. Cloren said Larry had mentioned complaints of Wagner about Chan, including the fact that Chan would be "maybe 5 minutes late" on occasions. Cloren said he told Chan with respect to Wagner's comments that he should "just kind of let 'em roll off."

Cloren said he was opposed to having Dillon's employees organized until he had the "the last disagreement with John Wagner and he told me there was one side to a story." Cloren said he, Chan, and Romaine went to the office of Local 860 and talked with a Mr. Patterson. Patterson explained, according to Cloren, that the Union had "had a contract with Dillon Tile and there was a lot of friction between the two."¹¹ Cloren said he, Chan, and Matlovich later (the next day he thought) turned in authorization cards at the union office.

Cloren said he was called into Larry's office between 4:30 and 5 p.m. on January 30 and fired by Larry.

¹⁰ Cloren said he regarded Larry as his immediate supervisor and that he would consult him concerning such personnel matters as time off, overtime, and raises. However, Cloren said he was told that he was to work with Wagner and see him about any problems he had. Cloren said Larry had told him he was to get along with Wagner. Cloren acknowledged that he did not get along well with Wagner and that he would avoid Wagner and, thus, a confrontation with him. According to Cloren, Wagner was "apathetic" and also had disagreements with other employees.

¹¹ Cloren testified that Larry had told him on one occasion in 1979 that the Company had been able to avoid a union contract it had by concealing the fact that Dillon had more than one warehouseman in its employ.

Wagner called him in, and Larry told him: "We decided for the good of the Company, we're going to let you go." Wagner did not speak during this final meeting, Cloren said. Cloren said he was then given his final checks—"one check for two week's severance pay, and . . . one check for three day's work." Cloren said Larry offered to give him an "excellent letter of recommendation," but that Cloren responded, "No thank you, Larry. I have some job offers. . . ."

Robert Patterson, secretary-treasurer of Local 860, testified that there had been a collective-bargaining relation between his Union and Dillon some years previously. He recalled that Cloren brought in authorization cards signed by Dillon employees and that the Union sent a letter, General Counsel's Exhibit 2, on January 28 to Dillon regarding representation of its employees. He also identified the letter received in response from Respondent's counsel, General Counsel's Exhibit 3. According to Patterson, the discharges occurred 2 days after he mailed his letter and that the Company did not thereafter recognize or bargain with the Union.

Lucius Deason, a ceramic tile layer and owner of Deason Tile Company, said Dillon Tile had usually given excellent service. He testified that service at Dillon had deteriorated in the fall of 1979. "[I]t just seemed like I would be waiting too long, and I'd see warehousemen walking around when I felt they should have been behind the counter," he said. He stated that there would be "a lot of people at the desk;" also, that there were occasions when he saw Chan walking around with a clipboard. He said he spoke to Larry Dillon, around January 1980 he thought, and told him that "service is getting terrible around here." Dillon replied, according to Deason, that there had been other complaints and something was going to be done about it.

Michael Cinti, chief operating officer of Commercial Tile Company, testified that service was "the worst at the end of '79 [and] the beginning of 1980." Said Cinti: ". . . we'd call in an order, and nobody would process the order until the person showed up, and then only after they took care of whatever else they felt like taking care of." Cinti said he felt the delays at Dillon were "unreasonable." There were people at Dillon available to wait on the customers but would not. According to Cinti, Dillon employees would pick up the phone or walk away rather than deal with a customer. He identified Chan (whose name he did not know) and Cloren as persons who had worked at the Dillon warehouse. Cinti said he wondered if Dillon Tile was trying to discourage his business and he told Larry Dillon and his father as much. Larry responded that he had heard a similar complaint from other contractors.¹²

¹² Arnold Stroppa, a ceramic contractor, testified that service at Dillon Tile varied, "depending on who was around." His testimony suggested sympathy with Dillon Tile and animosity toward Cloren, whom he claimed was not "around that much." He intimated that Cloren sought to sell, on his own and without Dillon's knowledge, certain tile and grout at a substantial discount.

Cloren later testified on rebuttal that a contractor, John Mehia, had asked help in selling some tile and grout left over on a construction job. Cloren testified that he told Larry immediately about the contact and

Continued

Larry Dillon, president of Dillon Tile, said he hired Cloren as warehouse manager in October 1978. Cloren was called upon to service customers and the "dissemination" of the workload in the warehouse. Larry stated. According to Larry, Cloren's performance as a warehouseman was "adequate" but was "below par" as a manager. Larry stated that he had told Cloren in 1979 that he was disappointed in Cloren's managerial qualities. Larry said he told Cloren in June 1979, when Cloren was given the \$.99 raise, that he felt Cloren's development as a manager was below his expectations. Larry said he indicated to Cloren that the warehouse manager should be more enthusiastic with the customers and more in command of the warehouse. Mrs. Dillon had mentioned, according to Larry, that Cloren was occasionally late and would do "some loitering" when phones would ring and customers needed help. In December 1979, when Cloren was given his second raise, Larry told Cloren that he should delegate work more and remain at the counter. Larry said he also told Cloren at that time that there had been complaints to the effect that "everything seemed to be a big joke and a big game during work hours" in the warehouse. By December 1979 and January 1980, according to Larry, Cloren had become "more curt." Larry stated that he witnessed occasions when Cloren was argumentative with Wagner. Larry stated that he spoke to Cloren in January about "showing some signs" of a desire to serve customers and "the idea that we appreciate their business."

Larry testified that Chan was hired in October 1978 and left on "personal business" 2 months or so later. Larry indicated that he was happy with Chan's work at that point and hoped that Chan would return, which Chan did in late January 1979.

At the time Chan received his first raise in June 1979 there "wasn't that much negative" to say about Chan's work; a few errors were mentioned and only in "light conversation," Larry said. In October 1979, when Chan's next raise was given, there was talk about Chan's increasing tardiness and poor packing of orders. Larry said he also referred to the "excess buddy-buddy going on between him and Joe in the warehouse" during working hours. Such behavior, he explained, included calling each other by nicknames over the intercom.

Customers complained in late 1979 and January 1980, according to Larry. He said Cloren, Chan, and Matlovich were doing most of the warehouse work at the

time.¹³ It was apparent, Larry said, that orders were not being timely processed and materials were not being back-ordered as they should have been. He maintained that there was a definite decline in the amount of business received from Newell Tile in 1979, and that he and Wagner "made some effort to recapture" it. Larry also maintained that both Chan and Cloren had been given warnings about their terminations. Chan had been warned, he said, "[a]bout things like being tardy, things about assembly of the order, putting the stock away, those type of things. . . ." Cloren had also been told. Larry asserted, about customer complaints in January and about his performance then and on "[p]ossibly three previous occasions."

Larry testified that his brother, Bob Dillon, and John Wagner had urged termination of Cloren and Chan well before January 30, 1980, but that he resisted because he was concerned about the warehouse jobs going "totally unfilled." Larry testified that he learned of "misunderstandings between Mr. Wagner, Mr. Chan and Mr. Cloren around August of 1979. . . ." Larry said he made the decision to discharge Cloren and Chan on the evening of January 28. Robert Kasper, an experienced tile warehouseman in the employ of a competitor, was at the Dillon Tile facility in San Francisco that evening and, after conferring with Larry, Bob Dillon, and Wagner, agreed to start work for Dillon as the warehouse manager in the first week of February.¹⁴ A warehousemen's job was also offered to Mike Kasper, Bob Kasper's brother, on the evening of January 28. Mike was "busy" that evening and not present at the meeting, but, according to Larry, Bob Kasper indicated Mike was interested in having the job. As it turned out neither of the Kaspers came to work for Dillon Tile—reportedly because of the long "commute" to the San Francisco Dillon Tile facility. According to Larry, however, "[t]hey were definitely hired."

Larry said he received the January 28 union letter (G.C. Exh. 2) around noon on January 30. He said he had decided to fire both Cloren and Chan at that time but had not yet notified them. Larry stated that he had told Mrs. Dillon to prepare paychecks for Cloren and Chan on January 29 but she suggested that the checks be drawn on January 30, the end of the pay period. After receiving the Union's letter, which Larry "felt . . . clouded what [he] could or could not do," he talked with counsel and proceeded to go ahead with the discharges "as previously decided" as "if there was no letter or Union on the scene."

John Wagner testified that as vice president of Dillon Tile he is responsible for "outside sales" as well as the "administration of the warehouse." The sales work, he estimated, took him out of the warehouse about 40 per-

that Larry indicated he was not interested. It is clear that Cloren's attempt to sell Mehia's materials was not a factor in Cloren's discharge. Larry indicated in his testimony that he did not learn of it until after the discharges.

Robert Gibbs, an official of a tile contractor, Newell Tile Company, Inc., said his company "nearly stopped" doing business with Dillon in 1979 because of poor service. He said his firm would order tile in advance by telephone, but he would still have to wait an hour or more to pick up the material after arriving at the Dillon Tile facility. He said he canceled orders a "couple of times" because of the wait and had complained about the service to John Wagner, who had inquired why Newell had stopped dealing with Dillon, as well as to Larry Dillon. Gibbs said the service at Dillon Tile had recently improved and that Newell was doing business on a regular basis again.

I give essentially no weight to the testimony of either Gibbs or Stroppa. Both sat in the hearing room and heard testimony of Deason contrary to the sequestration rule that had been invoked by Respondent.

¹³ On cross-examination Larry stated that Cloren took some vacation in December 1979 and that he (Larry) helped out in the warehouse at that time. Larry also acknowledged on cross-examination that in 1979 there was a 30-day period when the warehouse was short two people.

¹⁴ Larry said he had discussed with Bob Kasper possible employment as a warehouseman in the fall of 1979, but the prospect of Kasper being hired as warehouse manager was not mentioned until December. Bob Dillon and Wagner also testified about possible employment of Bob Kasper and his brother.

cent of the time. Wagner maintains his office in the warehouse where he can direct closely and observe the activities there. He said Cloren reported to him as warehouse manager and that Chan in turn reported to Cloren. Wagner said he tried not to have direct contact with Chan but that "there were some times when a specific requirement would be required."

Wagner said Cloren's performance deteriorated in 1979, especially toward the end of the year. According to Wagner, Cloren would ignore specific requests he would make of Cloren and that Cloren would also report, incorrectly, that specific jobs had been performed. Wagner asserted that Cloren became insolent. Wagner referred to a particular incident in late 1979 when he and Cloren engaged in a "yelling match" over the failure to serve Bob Gibbs of Newell Tile. Wagner stated that he had "a feeling of quiet hostility" when he and Cloren were both in the office at the same time. Said Wagner:

If I would walk into the office, Mr. Cloren would generally get up and leave the office. If he was on the phone he would get up, hang up that phone, put it on hold, and walk outside to one of the phones at the counter and continue the conversation out there.¹⁵

Wagner thought Chan did "very good" work up until mid-1979 when Chan began to voice complaints about the amount of work in the warehouse. Wagner indicated Chan was careless in filling orders and checking in materials. He recalled that he complained to Chan about the failure to help load materials for a customer and the failure to pick up strappings in the floor of the warehouse. According to Wagner, there was an occasion in late 1979 when Chan and Cloren spent 20 minutes laughing and talking in a back aisle.

Wagner testified that in late 1979 contractor customers complained that they could not get prompt service in the warehouse. Wagner said he had discussed the problems in the warehouse with Larry Dillon and that they began to look for replacements for both Cloren and Chan by October.

Robert Dillon testified that he is vice president of Dillon Tile and has been managing its Mountain View facility since 1977. Robert said he had heard complaints of poor service at the company's San Francisco facility and communicated that fact to his brother, Larry, and brother-in-law, John Wagner. Robert said he was aware that Wagner was wanting to replace either Cloren or Chan and that Bob and Mike Kasper were being considered as prospective Dillon Tile employees in December 1979 and January 1980.

Robert said he first learned of the organizing activity at Dillon Tile when his brother called and told him that he had received a letter from the Union.

Mrs. Verna Dillon testified she is a stockholder and that she has been an officer since 1961. In addition to handling accounts payable and accounts receivable she

orders all supplies and is responsible for the payroll of all employees. She said she had made entries on personnel files of employees based on what she had observed and what Larry or Wagner had told her.

Mrs. Dillon said she had observed that Chan was often late and that his tardiness increased toward the end of 1979. She said Chan also spent too much time in the restroom. Mrs. Dillon said she made suggestions to Cloren about keeping the warehouse clean. Cloren's attitude, she said, was one of "non-caring."

According to Mrs. Dillon, "we discussed" termination of Cloren and Chan in early January and she learned that both had in fact been discharged when Larry told her to "cut their checks" on January 29. She said she asked Larry to wait another day so it would be more convenient for her.

Mrs. Dillon testified she learned of the organizing activity at Dillon Tile on "the day the letter arrived for Larry."

The General Counsel argues persuasively that Joseph Cloren was an employee under the Act and not a supervisor. Cloren was given a title of a manager but not the authority. Cloren looked over an application of a prospective employee but did not interview anyone. He had no authority to hire or fire or grant a raise or overtime. He was an hourly employee and exercised no real independent judgment. The work assignments he made and other duties he performed were only of a routine nature. The minor disciplinary action he exercised was hardly sufficient to establish that he had the supervisory authority contemplated by Section 2(11) of the Act.

While the General Counsel established that Cloren was an employee under the Act, it was not established that his discharge was unlawful. The evidence, in fact, does not allow a finding of knowledge on the part of Dillon Tile that either Cloren or Darryl Chan had engaged in any union or other protected concerted activity. Employees testified credibly that they were careful to engage in union activities so that management would not know of them. Each member of management—Larry Dillon, Robert Dillon, Verna Dillon, and John Wagner—testified credibly that the decision to terminate both Cloren and Chan had been made prior to the time the Union's demand for recognition was received by the Company. It can hardly be inferred on this record that Dillon Tile, whether it harbored union animus or not, did in fact have prior knowledge of any union activity on the part of Cloren or Chan. See *A to Z Portion Meats v. N.L.R.B.*, 643 F.2d 390 (6th Cir. 1981).

The 8(a)(5) allegations are premised on the allegations of unlawful discharges. Without proof of any unfair labor practices, the entire complaint must be dismissed.

Based on the foregoing findings of fact and the record as a whole, I hereby make the following:

CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of Section 2(2) of the Act, engaged in commerce and in an industry affecting commerce within the meaning of Section 2(6) and (7) of the Act.

¹⁵ Cloren indicated antagonism towards Wagner when testifying. Cloren indicated that in 1979 he was short-handed in the warehouse and that Wagner was "more of a hindrance than a help."

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has not engaged in any unfair labor practice alleged in the complaint.

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in this case, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER¹⁶

It is ordered that the complaint be, and hereby is, dismissed in its entirety.

¹⁶ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.